STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2006
v	No. 258077 Oakland Circuit Court
LEQUIENT JAMES LEE, Defendant-Appellant.	LC No. 04-195031-FH

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

A jury found defendant guilty of felonious assault, MCL 750.82, and felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 3 to 15 years for the felonious assault conviction, and three to five years for the felon-in-possession conviction. He appeals by right. We affirm.

I

This case arises from an assault on defendant's former girlfriend, Kidadah Harsten, and Harsten's boyfriend, Corey Rand. A man knocked on the door to Harsten's apartment and identified himself as "Q," which is defendant's nickname. When Harsten opened the door, the man pointed a shotgun into the apartment and aimed it at Rand. Rand fled from the room and called the police on his cell phone. Harsten grabbed at the barrel of the gun and struggled with the assailant as they both left the apartment building. Outside the building, two or three men persuaded the assailant to leave with them.

Harsten and Rand told the police that defendant was the assailant. At trial, Harsten recanted her statement and testified that she did not recognize the assailant and did not look at him. Harsten's description of the vehicle in which the assailant left matched the vehicle that defendant and his friends were using that night, and her description of the assailant's clothes matched clothing the police found when they arrested defendant. Harsten explained that she initially believed the assailant was defendant because he identified himself as "Q" before she opened the door, but she never actually looked at him. Later, after she calmed down, she believed that it could not have been defendant because he had no reason to assault her and Rand.

Rand also recanted his earlier identification of defendant. He admitted that he identified defendant during his 911 call, but testified that he did not actually see defendant that night.[1]

The prosecutor sought to admit the recording of Rand's 911 call.[2] Defendant objected on hearsay grounds, and argued that the excited utterance exception to the hearsay rule did not apply. He also argued that the testimony was inadmissible under the Confrontation Clause. The trial court overruled defendant's objection. The 911 recording was played for the jury and a transcript of the conversation was also admitted.

Defendant was convicted of felonious assault against Rand and felon in possession of a firearm. He was acquitted on both an additional count of felonious assault against Harsten and of possession of a firearm during the commission of a felony, MCL 750.227b.

II

Defendant first argues that the trial court violated his constitutional right to confront witnesses by admitting the tape recording and transcript of Rand's 911 call. We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). But we review de novo as a question of law the proper construction of a rule of evidence. *Id.*

Defendant argues that the 911 recording was inadmissible hearsay and its admission violated his constitutional right to confront witnesses. US Const, Am VI. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999). Hearsay is not admissible except as provided by the rules of evidence. *Id.*; MRE 802. MRE 803(2) provides an exception to the hearsay rule for an excited utterance, which is defined as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that the declarant lacks the capacity to fabricate. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998).

Here, defendant does not dispute that Rand and Harsten both made the statements while they were under the stress of the assault. He argues, however, that several of Rand's statements were repetitions of Harsten's statements relating to events that Rand did not personally observe (e.g., the circumstances surrounding the assailant's departure from the scene). Defendant asserts that Rand's statements add an extra level of hearsay that renders them inadmissible. We

[1] The trial court permitted the prosecutor to read Rand's preliminary examination testimony at trial because Rand was uncooperative and unwilling to testify. Rand testified at the preliminary examination that he did not see defendant, but he identified defendant during the 911 call because he heard the name "Q."

[2] The voice of a woman, presumably Harsten, could be heard on the recording, and Rand seemed to be repeating her statements to the dispatcher.

disagree. Under MRE 805, "[h]earsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Rand's repetitions of Harsten's statements fall within the hearsay exception provided in MRE 803(1) for "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." So even if Rand did not see everything Harsten saw, he repeated her excited utterances immediately after he perceived Hartsen saying them. Accordingly, each level of hearsay in the 911 recording falls under an exception to the hearsay rule.

Defendant also argues that the recorded statements were inadmissible under the Confrontation Clause, US Const, Am VI. In *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that testimonial hearsay is admissible against a criminal defendant only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Although the *Crawford* Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'" it stated:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. [*Id*. at 68.]

In *People v Walker*, 265 Mich App 530; 697 NW2d 159 (2005), lv gtd 472 Mich 928 (2005), this Court held that a domestic assault victim's excited utterances following the assault were not testimonial statements. The *Walker* Court held the statements were admissible under Michigan's well-developed hearsay exception for excited utterances. Because the hearsay was not testimonial evidence, it did not violate the Confrontation Clause. *Id*. at 537-538.

Here, Harsten's statements on the 911 call were admissible as excited utterances, and Rand's repetition of them was also spontaneous. Because the hearsay was not testimonial evidence, the Confrontation Clause does not apply. The hearsay was properly admitted.

Moreover, both Rand and Harsten testified at trial and were subject to cross-examination. So even if the hearsay were testimonial, its admission in evidence did not offend the Confrontation Clause. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, *supra* at 59 n 9.

III

Defendant argues that the trial court erred in responding to the jurors' request for supplemental instructions. The trial court instructed the jury, in part, regarding prior inconsistent statements used to impeach a witness that "[t]he earlier statement is not evidence that what the witness said earlier is true." During deliberations, one of the jurors circled this part of the instruction and wrote the following question to the trial court:

> We need help deciding what the above circled sentence intends/means. Statements were made in court which are contrary to previously made statements.

> We understand that the earlier statement does not mean that the earlier statement is true, but can we choose to believe the earlier statement?

The trial court wrote the answer "Yes" and referred the jurors to CJI2d 3.6 (the instruction regarding witness credibility).

Defendant argues that the trial court's answer erroneously informed the jurors that they could consider a prior inconsistent statement introduced for impeachment as substantive evidence. Defendant concedes that he did not preserve this issue with an appropriate objection to the trial court's response and, accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

We do not find plain error. The jurors did not ask if they could rely on Harsten's prior statements as substantive evidence of defendant's guilt, but rather asked if they could choose to believe that Harsten spoke truthfully when she made them. The trial court correctly responded to this inquiry by replying that the jurors could choose to believe the prior statements, which is not the same as using them as substantive evidence.

Michigan's rules of evidence are compatible with permitting jurors to rely on a prior inculpatory statement to disbelieve a witness's exculpatory testimony at trial, without permitting the jurors to use the prior statement as substantive evidence. Our Supreme Court explained in *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997):

> Under the current provision of MRE 607 the government can impeach its own witness. The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant. *United States v Miller*, 664 F2d 94 (CA 5, 1981). *People v Stanaway*[, 446 Mich 643; 521 NW2d 557 (1994)], provided an exception to this rule: A prosecutor cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case.

Defendant does not contend that the prosecutor was precluded from using Harsten's prior inculpatory statement as impeachment under *Stanaway* or any other authority. Because the trial court's instruction did not contravene the distinction between proper use of impeachment and improper use of prior inconsistent statements, we find no plain error affecting defendant's subtantial rights.

We affirm.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey